SERVED: November 18, 1996

NTSB Order No. EA-4500

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of November, 1996

Petition of WAYNE O. WITTER for review of the denial by the Administrator of the Federal Aviation Administration of the issuance of an airman medical certificate.	)	Docket SM-4162

OPINION AND ORDER

The Administrator has appealed the written initial decision and order of Administrative Law Judge William E. Fowler, Jr., issued on December 1, 1995.[1] By that decision, the law judge reversed the Federal Air Surgeon's denial of a first-class airman medical certificate under sections 67.13(d)(1)(i)(a), (d)(1)(ii), (f)(2), 67.15(d)(1)(i)(a), (d)(1)(ii), (f)(2), and

[1] A copy of the written initial decision is attached.

67.17(d)(1)(i)(a), (d)(1)(ii), (f)(2) of the Federal Aviation Regulations (FAR), because of petitioner's history and diagnosis of sleep apnea, and because of a personality disorder.[2] The law judge found that petitioner had sustained his burden of proving

[2] FAR sections 67.13, 67.15, and 67.17(d)(1)(i)(a), (d)(1)(ii), and (f)(2) provide as follows:

(d) *Mental and neurologic-(1) Mental. (i)* No established medical history or clinical diagnosis of any of the following:

(a) A personality disorder that is severe enough to have repeatedly manifested itself by overt acts.

…(ii) No other personality disorder, neurosis, or mental condition that the Federal Air Surgeon finds-

(b) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(c) May reasonably be expected, within 2 years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified, medical judgment relating to the condition involved.

(f) *General medical condition…*

(2) No other organic, functional, or structural disease, defect, or limitation that the Federal Air Surgeon finds-

(i) Makes the applicant unable to safely perform the duties or exercise the privileges of the airman certificate that he holds or for which he is applying; or

(ii) May reasonably be expected, within two years after the finding, to make him unable to perform those duties or exercise those privileges;

and the findings are based on the case history and appropriate, qualified medical judgment relating to the condition involved.

by a preponderance of the evidence that he is qualified to hold an unrestricted first class airman medical certificate.

The Administrator raises two issues on appeal. First, he contends, the law judge committed reversible error by exhibiting bias in several of his evidentiary rulings. The Administrator argues that these rulings were arbitrary and an abuse of discretion, prejudicing the Administrator's ability to establish petitioner's lack of medical qualifications. Secondly, the Administrator asserts, the law judge erred in finding petitioner not disqualified on the basis of petitioner's (1) personality disorder and (2) chronic sleep apnea. Petitioner has filed a brief in reply, urging the Board to affirm the initial decision.[3] For the reasons that follow, we deny the appeal.

Standard of Review

The burden of proof in medical proceedings is on the petitioner. 49 C.F.R. Section 821.25, NTSB Rules of Practice in Air Safety Proceedings. Petitioner must establish his medical qualifications by a preponderance of reliable, probative, and substantial evidence. On appeal, the Board's authority is plenary, though substantial deference is given the findings of the administrative law judge, particularly to issues where

[3] Petitioner has also filed a motion to strike the Administrator's appeal brief because of its length. The motion is denied. There are no provisions in the Board's Rules of Practice that limit the length of a party's pleadings.

presiding at hearing will have given the law judge an advantage of firsthand observation. Indeed, witness credibility findings will be overturned only "when found to be inherently incredible or inconsistent with the overwhelming weight of the evidence." Administrator v. Blossom, 7 NTSB 76, 77 (1990)(citations omitted). In weighing medical testimony, the Board reviews the expert testimony and draws conclusions based on the quality of the opinions. This quality depends on "the logic, objectivity, persuasiveness, and the depth of the medical opinion." Petition of Ruhmann, NTSB Order No. EA-3710 at 11 (1992)(citations omitted).

Background

Petitioner has been a captain with Delta Airlines for over 28 years. Before joining Delta he was a Marine Corps Drill Instructor, a reconnaissance pilot in Vietnam, and a student at the Naval Academy.[4] In a friend's words, petitioner has "a very ebullient personality." See Testimony of Captain Boone, TR at 366. Petitioner is apparently known as a loud person. Many of those who know him like him very much. Others don't.

Petitioner has two reprimands in his Delta personnel file. In 1982, he violated a company rule on drinking within 24 hours of flying. In 1987, he allowed a microphone to be on during a conversation in the cockpit that was not meant to be heard by

passengers. Petitioner's personal life has been less successful than his Delta career. He has been married three times. His first marriage was very brief. His second marriage, according to the records entered into evidence, lasted for 20 years but was marred by verbal and physical abuse. Both he and his second wife also shared a penchant for heavy drinking.

In 1984, petitioner married his third and current wife. According to Mrs. Witter, the first several years of her marriage to petitioner were difficult.[5] She objected to petitioner's drinking, and she grew tired of his treating her "like a recruit." For the last few years, however, they have gone to a marriage counselor, and the marriage is now stable.

In February 1992, petitioner and his wife had an argument. Petitioner headed towards their bedroom, where they kept a loaded weapon, threatening to kill them both. Mrs. Witter fled from their home and sought refuge with a neighbor, who called the police. Petitioner was subsequently arrested and charged with terroristic threatening. According to petitioner, he never intended to use the weapon. He explained that his wife's first husband had committed suicide by shooting himself with a gun, and he claims that he only made this threat because he knew it would be a "low blow" to his wife. According to Mrs. Witter, the

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(…continued)

[4] Petitioner left the Academy to marry.

[5] Mrs. Witter now denies much of this history.

threat caused her a great deal of concern for petitioner's mental health. She testified that she expressed her concerns to the judge and the prosecutor after petitioner's arrest, and as a result, petitioner was offered the option of going to a psychiatric ward for evaluation, rather than going to prison. Petitioner chose the former.

Petitioner was examined by several psychiatrists and subjected to batteries of psychological tests during his hospitalization. He was diagnosed by more than one examiner as having some type of a mental disorder, ranging from a personality disorder to bipolar disorder.[6] When the time came for his discharge from the hospital, petitioner's employer, Delta, insisted that he also be evaluated for alcoholism. Petitioner was then admitted to an inpatient treatment program for alcohol abuse, at Anchor Hospital. It is quite clear from the records that petitioner drank heavily for many years.[7] Finally, petitioner acquiesced to his Chief Pilot's demand that he undergo a third hospitalization for testing. In total, petitioner was hospitalized for over 30 days.

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[6] The FAA's chief psychiatrist dismissed the diagnosis of bipolar disorder in a 1992 case review, agreeing with petitioner's treating psychiatrist, Dr. Smith, that petitioner did not meet the criteria for such a diagnosis, and that the diagnosis had been reached by a physician who had interviewed petitioner for only one hour.

[7] Petitioner was advised to curtail his drinking because of his sleep apnea condition, *see infra*. He claims to now limit his drinking to an occasional beer or wine. Whether he totally (…continued)

After his discharge, petitioner was sent to Houston to see Delta's aviation medicine consultant, Dr. Michael Berry. Dr. Berry sent petitioner to a psychiatrist and a psychologist for evaluation. These consultants opined that petitioner did not have a personality disorder.[8] Dr. Berry then amassed all of the medical evidence and evaluated it independently. He agreed with his consultants that, notwithstanding the various diagnoses petitioner had received during his hospitalizations, he did not suffer from a disqualifying mental disease or disorder. Dr. Berry specifically adopted the final diagnosis of petitioner's treating psychiatrist, Dr. Randy Smith, who found that petitioner had suffered an ***adjustment disorder*** in 1992, as a result of stress in his marriage, and that this adjustment disorder was now resolved.[9] The FAA's Chief Psychiatrist, Dr. Barton Pakull, agreed. In July 1993, petitioner was returned to Delta's flight line.[10]

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abstains from alcohol is not relevant here.

[8] These consultants, Doctors Faillace and McLaughlin, had been identified as witnesses that the Administrator had intended to call as experts. Shortly before the hearing, however, the Administrator notified petitioner's counsel that other experts would appear instead. We do not reach petitioner's claim that he was prejudiced by the substitution, noting only that in the absence of solid justification for the change, the law judge would have been within his discretion to disallow it.

[9] An "adjustment disorder," unlike a "personality disorder," is not specifically disqualifying.

[10] Petitioner's return was delayed because of serious injuries
(…continued)

In recommending petitioner's reinstatement, Dr. Berry concluded that petitioner had personality "traits" that were characteristic of a personality disorder, but were not of sufficient magnitude to support a diagnosis of a mental disease. Nonetheless, he warned Delta, if petitioner ever exhibited any unusual or aberrant behavior while flying, it could be evidence of another ***adjustment disorder***, and he recommended that petitioner should then be grounded permanently.[11]

In November 1993, shortly after he returned to the flight line, petitioner had a conflict with his flight crew during a 12-day European rotation. According to petitioner, his crew had an "attitude problem." On the third day of the rotation, he claimed, they would not call out altitude levels for him, and as a result, he admits he deviated from his assigned altitude by 200 to 300 feet, on 3 occasions. By the eighth day of the rotation, petitioner confronted his crew with the situation, but in his opinion, nothing changed. On the ninth day of the rotation, petitioner had problems with the Omega Navigation System. The First Officer, according to petitioner, told him he should call in the problem. Petitioner replied that he already had, and the

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that he sustained in a fall.

[11] We would note that a further "adjustment disorder" would not automatically, or even logically, have elevated respondent's condition to that of a "personality disorder." Hence, Dr. Berry's contingent recommendation for a permanent grounding could not technically be achieved by medical disqualification.

First Officer argued with him and claimed that he had not made the call. Once on the ground, the First Officer discussed the problem with a mechanic. When petitioner added his comments, the First Officer, petitioner claims, closed the cockpit door and chastised petitioner for interrupting his conversation. An argument ensued. The argument ended when petitioner informed the First Officer that he was the captain in the cockpit, not the First Officer. On the next leg that same day, petitioner claims that "someone" may have tampered with the Omega system. On the following day, which was the last day of the rotation, no one spoke in the cockpit. Petitioner states that he felt he was "flying solo." All three agree that the situation compromised flight safety.

Petitioner called his Chief Pilot from Europe to complain about the situation, and he was told to file a report on his return. The other crew members were asked to make written reports at later dates. According to the written statement of Second Officer Sweeney, "[s]ome of the problems were personality related, some of the problems were attitude related, and the most serious problems were safety related." He claims that petitioner's written statement contained false allegations and was very distorted. Most seriously, he charged that petitioner demonstrated a "severe lack of flying skills." In addition to the three altitude deviations and a go-around that petitioner does not dispute, Second Officer Sweeney claims that on the first

leg of the rotation, petitioner failed to tie in the Omega system and, as a result, the aircraft veered 15 nautical miles off course. The Second Officer also states that petitioner had at least 4 "screaming fits" in the cockpit when his statements were challenged. Second Officer Sweeney concludes in his written statement that petitioner's "terribly bitter attitude, along with his violent, aggressive personality make it extremely difficult for the other crew members to perform their duties." He indicates that he is "extremely concerned that all these character traits combined will some day result in disaster and great loss of life."

The First Officer, Jeff Berlin, did not submit a written statement until March. His statement attributed the conflict to the fact that he is young, and petitioner cannot accept advice or suggestions from a young crew member because of an inferiority complex.

Petitioner, Sweeney, and Berlin were sent to cockpit resource management (CRM) training in February, but the meeting resulted in more conflict and they were unable to work out their differences. During the period between the cockpit incident and the CRM session, petitioner flew three more European rotations and had two more flight checks, all without incident.[12]

[12] Three Delta pilots testified on behalf of petitioner. Captain Lobdell performed two of the flight line checks that occurred after the November incident. He rated petitioner's piloting skills as an "8" on a scale of 1 to 10. He had been instructed (…continued)

Nevertheless, when the CRM attempt failed, Dr. Berry was asked to re-evaluate petitioner. Petitioner's Chief Pilot specifically asked Dr. Berry if the November cockpit incident was an example of the type of behavior that Dr. Berry had previously warned Delta about.

Dr. Berry interviewed petitioner in person and spoke with Berlin and Sweeney by telephone. According to his report, Berlin and Sweeney stated that petitioner's flying skills were so poor that they had feared for their lives during the entire rotation.[13] They told Dr. Berry that they had quit making comments or suggestions of any kind, because of petitioner's angry responses. They told Dr. Berry that they had to maintain extreme vigilance throughout the rotation, or else petitioner's lack of flying skills would "kill them all." Berlin and Sweeney

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to observe petitioner's interactions with his crew, and he reported that he observed no difficulties whatsoever. Robert Owens flew the European rotation with petitioner twice in 1994, and had no difficulties with him or his flying skills. He described petitioner as relaxed, outgoing, and fun to be with. Captain Fred Boone has known petitioner for 20 years. In his opinion, petitioner is no more arrogant than any other airline pilot. He has never required excessive admiration from others, and he does not lack empathy for other people. According to Captain Boone, petitioner is easily misunderstood because he speaks forcefully.

[13] It is important to note that these comments, if believed, would have supplied obvious justification for the air carrier's concern over petitioner's continued flight status, but they do not reflect automatically on medical issues, and the use of medical certification proceedings as a substitute for performance-related personnel actions would be an abuse of the administrative process.

also told Dr. Berry that neither one of them had been confrontational. Dr. Berry noted in his report that, "on the contrary, they both felt as if they had compromised to maintain some degree of harmony in the cockpit." Dr. Berry states in his report that he was "very impressed" by Berlin and Sweeney after speaking with them.

Dr. Berry also interviewed the Chief Pilot by telephone. He told Dr. Berry that he believed petitioner was responsible for much of the conflict that occurred. Dr. Berry states that the Chief Pilot now believes petitioner called him from Europe only to complain before his crew complained about him. The Chief Pilot told Dr. Berry that petitioner is known as loud, bombastic, and untruthful. Dr. Berry relates that the Chief Pilot believes petitioner cannot accept criticism from someone younger, and that petitioner always blames problems on someone else.

Dr. Berry concluded in his report that petitioner has a narcissistic personality disorder, and that he has "no doubts" about the validity of his diagnosis. Based on Dr. Berry's report, petitioner was grounded by Delta. Dr. Berry then forwarded his report to the FAA, which continued to re-certify petitioner until the matter was reviewed by a panel of psychiatric experts. Based on that review, the Federal Air Surgeon reversed the issuance of petitioner's most recent medical certificate.

Petitioner's Medical Evidence

Petitioner's first [and presumably hostile] medical witness was Dr. Barton Pakull, Chief Psychiatrist for the FAA. Dr. Pakull testified that he initially reviewed petitioner's case in September 1992. At that time petitioner's medical records included all of the hospitalization records generated by the 1992 incident, including his history of spousal abuse and heavy drinking. Having all this information before him, Dr. Pakull nevertheless rejected the diagnoses of alcoholism, bipolar disease, and personality disorder. In his opinion, these diagnoses were not sustainable.

According to Dr. Pakull, a personality disorder diagnosis is, of necessity, somewhat subjective. He explained that the diagnosis is appropriate when a person has an enduring set of personality traits that become troublesome to the individual or society. While Dr. Pakull recognized in 1992 that petitioner had some of the characteristics of a personality disorder, he stopped short of making the diagnosis because none of the events described in petitioner's medical records were severe enough, in his view, to deny petitioner certification. Moreover, Dr. Pakull explained a personality disorder is a life-long condition. If petitioner had a personality disorder, he reasoned, it should have become apparent during his 25-year career with Delta.

Regarding the 1992 arrest, Dr. Pakull testified that he did not consider this incident an "overt act" indicative of a

personality disorder at the time of his first review. In his written review dated September 24, 1992, Dr. Pakull appears to accept petitioner's explanation that the events arose from Mrs. Witter's overreaction because of her first husband's suicide.

Dr. Pakull testified that he felt strongly about his first recommendation to keep petitioner flying. However, when Dr. Pakull learned about the November 1993 cockpit incident he decided to submit the case to a panel of experts and ask them if they thought he had been wrong in 1992. Their decision to recommend denial of certification was unanimous, he related. However, he rejected the panel's suggestion that petitioner's personality disorder could have an organic cause; he testified that in his opinion, petitioner's continued good performance on neuropsychological testing ruled out an organic cause for his symptoms.

Dr. Randy Smith is petitioner's treating psychiatrist. Dr. Smith is Board-certified in psychiatry and neurology. He is also certified in addiction medicine. During his residency, Dr. Smith specialized in the area of personality disorder. Dr. Smith has treated petitioner since he was called in to evaluate petitioner in March 1992, during the hospitalization at Anchor Hospital.[14] Dr. Smith testified that, in his expert opinion, a personality disorder is such that the diagnosis can only be made after a

[14] Dr. Smith saw petitioner regularly until May 19, 1992, and then continued to follow him at Dr. Pakull's request.

psychiatrist has seen the patient over a period of time, so that the doctor is able to get a sense of what is "normal" for the patient. Dr. Smith is the only psychiatrist who diagnosed petitioner based on several years of personal observation.

According to Dr. Smith, petitioner functions too well, in too many areas, to be diagnosed with a psychiatric illness. By definition, Dr. Smith testified, if petitioner had a personality disorder, it would have shown up before 1993 in his job performance. Petitioner is "colorful and unique, but not crazy or disabled". TR-496.

Dr. James Wellman is board-certified in internal medicine, pulmonary medicine, and sleep disorders medicine. In 1987, petitioner experienced cardiac arrhythmias. During a subsequent cardiac evaluation, his wife reported that petitioner seemed to stop breathing at times while sleeping, and that he was snoring heavily. As a result, petitioner was referred to Dr. Wellman in 1988. Dr. Wellman performed a sleep study and found that petitioner suffered from sleep apnea. According to Dr. Wellman, sleep apnea results from an obstruction in the airway that causes the individual to stop breathing during sleep for 10 seconds or longer.[15] Sleep apnea results in sleep deprivation, which in

[15] Petitioner's medical records also reveal a long history of breathing problems and chronic sinusitus. He has also broken his nose more than a dozen times, and undergone multiple nasal surgeries.

turn leads to fatigue, lack of alertness, and may result in irritability, paranoia, and a quick temper.

Petitioner underwent several surgeries to correct the condition, and he has lost weight in accordance with his doctor's instructions. Dr. Wellman also advised petitioner that he should not drink alcohol within 3 hours of bedtime. During his first year of treating petitioner, Dr. Wellman prescribed a breathing apparatus known as a Constant Positive Airway Pressure (CPAP) device. The CPAP is a mask that maintains constant air flow pressure during sleep.

According to Dr. Wellman, the use of the CPAP device has made a tremendous difference in petitioner's life, from a medical and an emotional standpoint. TR-451. Dr. Wellman explained that when he first started treating petitioner, he found him gruff and irritable. Dr. Wellman testified that today, however, the aggressiveness in petitioner's behavior has drifted away and is no longer a part of his personality. Petitioner is more sensitive to his health needs, and to others around him. According to Dr. Wellman, petitioner now listens to him, rather than trying to interject when Dr. Wellman is trying to give him advice. TR-456.

Dr. Wellman testified that petitioner's sleep apnea condition is not "cured." The condition has, however, been successfully treated. Dr. Wellman testified that most of his patients, including petitioner, do not want to use the CPAP

device initially, because it is cumbersome. As a result, their symptoms may reappear. However, he explained, petitioner is now fully compliant in his use of the CPAP, and he has been for several years.[16] Dr. Wellman explained that he knows petitioner is compliant in his use of the CPAP because he usually follows his patients' progress by simply asking them how they are doing with the device. With petitioner, however, because of his job and the FAA's need for documentation, Dr. Wellman has repeatedly tested petitioner in his sleep laboratory, using objective, Maintenance of Sleep Wakefulness testing. Dr. Wellman reports that petitioner is able to maintain full alertness during the testing. Therefore, Dr. Wellman testified, he is following his treatment as prescribed. In Dr. Wellman's expert opinion, so long as petitioner uses the CPAP on a regular basis, he will not show signs of daytime sleepiness or fatigue. On cross-examination, Dr. Wellman agreed that it was appropriate, because petitioner's work requires alertness, that petitioner be in a carefully monitored, follow-up program, in order to insure that petitioner is following treatment and continuing to respond to treatment.

Finally, the petitioner presented the testimony of Dr. Donald Hudson, a physician board-certified in aerospace medicine

[16] Petitioner and his wife testified that he uses the CPAP device every night. According to petitioner, the only times he failed to use it were when he was hospitalized in 1992, and one time in 1989 when he mistakenly believed the sleep apnea condition had (…continued)

who is on the staff of the Airline Pilots Association (ALPA). Dr. Hudson is a Senior Aviation Medical Examiner, a pilot, and a former Air Force flight surgeon. Dr. Hudson does not believe petitioner has a personality disorder. He rejects the contention of Dr. Berry and his consultants that petitioner has always had a personality disorder but it has just recently "come out." He testified that petitioner could not have such a disorder and not have it affect his performance in 25 years with Delta.

As to petitioner's sleep apnea condition, Dr. Hudson testified that he was aware of more than 25 airline pilots who hold unrestricted certificates even though they are treated with a CPAP device. In Dr. Hudson's opinion, petitioner is qualified to hold an unrestricted first class airman medical certificate.

The Administrator's Medical Evidence

The Administrator presented the testimony of Dr. Michael Berry, a physician board-certified in aerospace medicine, occupational medicine, and general preventative medicine. Dr. Berry has served as a medical consultant to Delta Airlines since 1988. He is a former Air Force flight surgeon, and was the chief of the Flight Medicine Clinic at NASA. Dr. Berry explained that in order to specialize in aerospace medicine, he was required to perform a residency that included study in pulmonary physiology,

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been cured.

altitude physiology, cardiology, otolaryngology,[17] psychiatry and ophthalmology. Dr. Berry explained that his expertise is in aerospace medicine, and therefore he refers pilots he is evaluating to specialists and then applies what the specialist finds to determine what effect a particular pilot's medical condition may have in the aviation environment. With regard to petitioner, he consulted with a psychiatrist, Dr. Faillace, a psychologist, Dr. McLaughlin, and a cardiologist, Dr. Lambert.

Dr. Berry's testimony on direct examination consisted, essentially, of his explanation on how he developed the diagnoses contained in his medical reviews regarding petitioner, as previously described in this decision. He explained that he agreed with Dr. Faillace's impression that petitioner's personality was such that, given the correct stressors, a personality disorder could become manifest. TR-670. The law judge asked Dr. Berry, "but don't we all have these traits that, given the right environment and the right catalyst…could cause us to erupt?" Dr. Berry replied "yes," but testified that petitioner had "crossed the line" and now, in his opinion, his personality traits should be "considered a pathology." TR-671.

The Administrator also presented the testimony of Robert Elliott, a clinical psychologist who is board-certified in

[17] Dr. Berry also testified that sleep apnea is disqualifying if it is not treated adequately, but that his impression regarding petitioner was that his condition "was being treated correctly and followed, and as long as it was followed, that was fine." (…continued)

neuropsychology and who specializes in aviation psychology. Dr. Elliott serves as a consultant to several airlines and to the FAA.

Dr. Elliott reviewed petitioner's entire airman medical file, including the results of neuropsychological testing. Dr. Elliott believes that petitioner has suffered brain damage as a result of multiple head traumas, his sleep apnea condition, and alcohol abuse. TR-815. He also believes that petitioner has characteristics of several different types of personality disorders. He noted in his testimony several items that appear in petitioner's airman medical records, including the 1992 event with his current wife, the history of abuse towards his current wife,[18] the history of an argument with his second wife where she apparently was struck in the forehead by petitioner with a fork, an incident where he broke a television screen by throwing a glass at it, an incident on a highway where petitioner was attacked by another driver and responded by taking the aggressor's baseball bat from him and damaging the other person's car with the bat, and the 1993 cockpit incident. In Dr.

(…continued)
TR-660.

[18] The Administrator also presented the testimony of Ms. Deborah Burk, the Victim/Witness Program Coordinator for DeKalb County, Georgia. Ms. Burk testified that following petitioner's arrest in 1992, Mrs. Witter told her that petitioner had been violent with her "on and off" during their marriage, and that he had a bad temper and bad drinking problem.

Elliott's opinion, these items constitute a history that supports the diagnosis of personality disorder.

Finally, the Administrator presented the testimony of Dr. David Jones, a physician board-certified in aerospace medicine and psychiatry. Dr. Jones was a member of the panel that reviewed petitioner's case for the Federal Air Surgeon.[19] Dr. Jones described a person with a personality disorder as a "one-string fiddle." TR-889. He explained, if an individual is narcissistic, for example, he will be narcissistic with everyone and it is inevitable that there will be conflict "with the world." Dr. Jones testified that when he reviewed petitioner's case it became apparent to him that many different people were coming up with the same impressions. Thus, he concluded, when petitioner is stressed, the "real" petitioner comes out and he is unable to control his personality disorder. Finally, Dr. Jones concluded, while petitioner's personality disorder may not appear to be severe, and may even seem "trivial" to a psychiatrist such as Dr. Smith, those who are "aeromedically sophisticated" such as he and Dr. Berry, consider petitioner's "level of pathology" unacceptable in an aviation environment. TR-900. He believes that if petitioner was confronted with a similar situation to the

[19] The Administrator also offered into evidence the deposition testimony of Dr. William Sledge, who chaired the FAA psychiatry panel. He also testified that at least half of a diagnosis should be based on clinical observations. However, he dismissed Dr. Smith's opinion because he believes that petitioner probably did not reveal sufficient details of his history to Dr. Smith.

November 1993 incident, the potential for another incident in the cockpit is great.

The Law Judge's Decision

The Administrative Law Judge set forth in detail the voluminous evidence he considered before concluding that petitioner had established that he is qualified to hold an unrestricted airman medical certificate. He determined that the record failed to establish that petitioner had exhibited the pathological behavior indicative of a personality disorder.

In reaching this decision, the law judge found the testimony of Dr. Smith more persuasive than the testimony of the Administrator's expert witnesses. The law judge indicates that he placed a great deal of significance on the proposition, agreed to by experts for both petitioner and the Administrator, that those doctors who interviewed petitioner in person had the best opportunity to observe and diagnose his behavior. The law judge also placed importance on the fact that Drs. Pakull, Faillace, and McLaughlin initially gave great deference to Dr. Smith's evaluations, because he was petitioner's treating physician and it was he who had spent the most time with petitioner and could, therefore, render the most informed opinion.

The law judge specifically found Dr. Elliott's testimony for FAA unconvincing, not accepting that a pattern of behavior (i.e., "repeated manifestations," as required by §§ (d)(1)(i)(a) of the

pertinent rules) is revealed in petitioner's medical records. Indeed, the law judge noted, many of the references made by Dr. Elliott relate to the 1993 cockpit incident.

The law judge also found it significant that Dr. Pakull and Dr. Berry were fully aware of the references to petitioner's history of spousal abuse and other angry outbursts, and yet both physicians felt that this history was insufficient to support a disqualifying diagnosis of a medical disorder, prior to the 1993 incident. The law judge notes that in Dr. Pakull's 1992 review, he found that petitioner's record was absent of the lifelong conflict that would normally be seen in individuals with personality disorders. The law judge notes that Dr. Hudson still holds this opinion.

Finally, the law judge specifically rejected the testimony of Dr. Berry, noting that his analysis is based on speculation and is without evidentiary support, pointing out as an example Dr. Berry's suggestion that the only reason there is one documented incident in the cockpit is because younger crew members would be reluctant to complain about a senior captain.

As to the 1993 cockpit event, the law judge determined that it was not indicative of a personality disorder based on his credibility findings in favor of petitioner and against the Second Officer. The law judge concluded that the event did not occur as it was described by the Second Officer and First Officer. He found that, although petitioner was aggressive, he

met "an equally aggressive, defensive personality in Second Officer Sweeney and, to a much lesser extent, First Officer Berlin,[20] which probably did as much to fuel the continuing problems in the cockpit as the alleged initiating statements and actions by petitioner." I.D. at 10. The law judge found that the truth about the November rotation lay somewhere in between the stories given by petitioner and his flight crew. In the final portion of this particular analysis, the law judge also refers to the testimony of Captain Lobdell. The judge notes that Captain Lobdell had no apparent ulterior motive to misstate his testimony, and Captain Lobdell found petitioner's flying skills to be more than adequate during the two line checks he gave petitioner that occurred after the 1993 cockpit event. We agree that this testimony was persuasive. We also think it significant that both the First Officer and the Second Officer's descriptions of the events seemed to become increasingly horrific with each telling.

With regard to the sleep apnea condition, the law judge found that petitioner's sleep apnea condition does not now, and will not within the next two years, render him unable to safely perform the duties and exercise the privileges of the holder of

[20] We agree with the Administrator that it was error for the law judge to exclude the First Officer's testimony. Testimony of a percipient witness is rarely cumulative, particularly where the facts are hotly contested. However, since the witness' written statement was considered by both the law judge and the Board, we find that any error caused by the exclusion of this testimony (…continued)

an airman medical certificate, because the undisputed evidence is that petitioner is fully compliant with the treatment measures prescribed by his physician, his treatment has been successful, and he no longer suffers from the symptoms of the condition.

Conclusion

Upon consideration of the briefs of the parties, and of the entire record, the Board has decided to affirm the decision of the Chief Administrative Law Judge. We adopt the law judge's findings as our own, with the exceptions noted below. We believe the decision of the law judge to be consistent with precedent,[21]

(…continued)
would not have influenced the outcome of this proceeding.

[21] The Board has reviewed similar medical cases on at least sixteen occasions. We upheld the Federal Air Surgeon's determination in half of these cases, when we were persuaded that there was evidence of pathological behavior. In Petition of Sumrall, 3 NTSB 953 (1978), aff'd 588 F.2d 826 (5th Cir. 1979), for example, a finding of a disqualifying personality disorder was found where the pilot had a history that included 2 felony convictions, 15 traffic violations, and 3 FAR violations. Similarly, in Petition of Herron, 4 NTSB 3384 (1981), we found that a record including 3 bad check convictions, 5 year's imprisonment on fraud charges, and convictions for grand larceny and check fraud, and one low flying incident, all of which were concealed on an application for a medical certificate, evidenced a disqualifying disorder. See also Petition of Whittinghill, 1 NTSB 183 (1968) (4 disciplinary proceedings in high school, dismissed from 2 colleges, 6 FAR violations, and 43 traffic violations found to constitute evidence of continuous and unremitting pattern of violations of societal rules); Petition of Doe, 1 NTSB 64 (1964) (petitioner dishonorably discharged from military, stole two aircraft and a motorcycle, had several traffic violations, and was an admitted pedophile). However, for more than twenty years, the Board has steadfastly rejected the finding of a personality disorder where an individual's record, while perhaps less than admirable, fails to evidence the type of (…continued)

logically presented, supported by a preponderance of the evidence, and we defer to the judgments made regarding the credibility of the witnesses, including the evaluations of competing medical testimony.

Discussion

I. *Did the law judge err in finding that petitioner does not suffer from a personality disorder*?

The law judge concludes his analysis of the medical and factual evidence by finding that petitioner's conduct does not constitute a personality disorder of the type encompassed in the regulations. We have rehearsed in some detail the background and testimony in this preceding because we believe it to have been complex and certainly not without complicating factors. There can be little doubt that the differences between the manifestations of a disqualifying personality disorder and a non-disqualifying adjustment disorder may not be apparent to the uninitiated.[22] Indeed, most of the experts whose work was

(…continued)
behavior that has adversely affected his entire social and professional life, over a significant period of time. See e.g., Petition of Dennis, 1 NTSB 1347 (1971), Petition of Doe, 2 NTSB 1041 (1974), Petition of Philips, 4 NTSB 1262, recon. den. 4 NTSB 1272 (1984), Petition of Mawby, 3 NTSB 3510 (1981), Petition of Kennedy, 5 NTSB 2341 (1987), and Petition of Thomas, 5 NTSB 1982 (1987).

[22] We refer to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, American Psychiatric Association (1994)("DSM-IV"), portions of which were entered into evidence by (…continued)

reviewed in this proceeding were at one time or another of two minds as to which of the conditions petitioner suffered from. Each side offered its reasons for its change of heart, and each side presented in some detail the basis for its currently held opinion. The law judge was entitled, indeed we rely on the judge, to weigh these shifting sands and competing theories in light of his experience and the presentation of the witnesses. We believe the administrative law judge has performed this task well, and that his determination to give greatest weight to the diagnosis of a fully-qualified physician with long personal observation of petitioner is well within bounds.[23] We will not disturb it.

We note at the outset that the law judge's findings are made with regard to an airline captain of more than 20 years

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(…continued)
petitioner. DSM-IV indicates that "[i]t is only when personality traits are inflexible and maladaptive and cause significant functional impairment pervasive across a broad range of personal and social situations, that a diagnosis of personality disorder is to be made." See DSM-IV at 633. An adjustment disorder, on the other hand, is the development of significant emotional or behavioral symptoms in response to identifiable stressers. See DSM-IV at 623. We think the law judge's findings that petitioner's flying skills are not poor and that his personnel records do not have documented problems or complaints, show that petitioner's personality traits have not affected a broad range of situations.

[23] Reliance on the treating physician, here Dr. Smith, is not any less acceptable because of the doctor's change in diagnostic opinion from those of his very first sessions with respondent. Dr. Smith's explanation of this change is credible, and we note, that Delta's Dr. Berry, like Dr. Smith, had rejected the early suggestion of a personality disorder when Berry made his recommendation to the carrier in 1993.

experience whose personality, however unique, appears to have intruded on his duties only once, arguably twice. While, of course, the burden is the petitioner's to prove qualification, decades of productive employment are a substantial testimony in this context, particularly as all experts seem to agree that personality disorders are typically early in onset and persistent.

The Administrator argues that the law judge ruled only on those personality disorders manifested by a history of overt acts because the law judge failed to understand the full scope of the regulatory proscription. Personality disorders are disqualifying not only when manifested by overt acts,[24] but otherwise as well, under the provisions of subparagraph (d)(ii)(b) and (c) of the pertinent regulations.[25] We have reviewed this claim for the possibility of error requiring remand or reversal, and we find none. We would have preferred an explicit conclusion of law on this point, but even in its absence we are prepared with confidence to believe that the law judge, with his extensive experience, understood the structure of the regulations, and that his finding was intended to be sufficiently broad to encompass all. His focus on overt acts was reflective of the presentation of evidence by the Administrator, and, we suspect, logically

[24] The administrative law judge specifically found that there was no sufficient history of overt acts to support a disqualifying diagnosis.

[25] See note 2 above.

driven by the fact that the existence (or absence) of such acts might well be the strongest evidence for (or against) a disqualifying pathology. All of the medical evidence was carefully weighed and it supports the conclusion that petitioner met his burden with respect to each of the subsections of the personality disorder regulations.

The Administrator argues, however, that this would not be the case but for restrictive discovery and evidentiary rulings issued by the judge, rulings that prevented the Administrator from making a full presentation of his case, particularly with regard to prior acts. We have reviewed this claim carefully, recognizing the competing interests at stake. We think the general rule for administrative proceedings should be one of inclusion, and we are perplexed by the law judge's determination against the hearing of testimony from one of the eyewitnesses to precipitating events in this controversy. Still, petitioner makes an important distinction between discovery by the Administrator aimed at understanding petitioner's side of the argument, which petitioner would not oppose, and broad-based fishing expeditions aimed at finding evidence to support determinations that have already been made and whose consequences have already been felt. It is correct to say that when the Administrator denied petitioner a medical certificate on the basis of the overt acts of a disordered personality, the Administrator should have been largely prepared to prove the

existence of the acts. We have reviewed the discovery rulings of the law judge in this light, and we cannot find that they are entirely without basis, or that they precluded a successful presentation by the Administrator. There was ample medical evidence, and ample basis to understand why it was in dispute.

It is the responsibility of the law judge to control the proceedings, and he must necessarily exercise his discretion to produce a fair and efficient proceeding. To the extent that the Administrator sought evidence to rebut petitioner's dispute of a life-long disorder, the law judge was not abusing his discretion by insisting that discovery into old, remote evidence be made with specificity. The Administrator's requests seemed broad and speculative. For example, the Administrator demanded medical records from petitioner concerning his current and former spouses, without attempting any explanation as to why he believed that petitioner had access to such evidence, assuming that it existed and was relevant to the proceedings. The Administrator demanded personnel records from petitioner, even though, we think, he should have reasonably assumed that any evidence in Delta's possession concerning other documented problems in the cockpit had already been made available to the Administrator. The Administrator also claimed he was entitled to petitioner's alleged evidence of a conspiracy against him. However, the mere fact that petitioner suggests in his pleadings that he has

another dispute with his employer did not automatically make that dispute relevant to these proceedings.

Finally, the Administrator also claims reversible error because his request for subpoena duces tecum for Mr. Johnson, Dr. Hudson, and Dr. Smith were denied. We think that if the Administrator believed that either Dr. Hudson or Dr. Smith had other relevant medical records, counsel should have explored that issue during cross-examination, since both individuals appeared as witnesses at the hearing. Having failed to do so, the claim that other relevant records may still exist is speculative, at best. As to Mr. Johnson, in our view the Administrator never articulated the relevance of the documents sought in that subpoena.

We note in closing on this issue that the precise matter before the Board is whether there exists in petitioner a disqualifying personality condition under the regulations. A negative finding on that question is not tantamount to a determination that petitioner should be returned to flight status. Whether petitioner’s skills, attitudes, and interpersonal abilities were or remain consistent with the very high order of technique and team work needed in the modern cockpit is a complex issue, only a small part of which is answerable here. We do not doubt the sincerity of the concern first expressed by the actions of petitioner’s managers, nor do we question the bona fides of the FAA’s subsequent steps in

seeking a medical disqualification. We see nothing either sinister or cynical in these proceedings. Indeed, there may well be advantages for petitioner, were he to be removed from flight duty status, to have his removal based on medical disability. Nevertheless, the use of medical certificate proceedings to address what may be personnel issues would obviously be an abuse of process to be avoided assiduously.

II. *Is Sleep Apnea a Disqualifying Condition?*

Finally, we turn to the issue of petitioner's sleep apnea condition. The Administrator asserts that the fact that the medical certificate issued to petitioner since 1990 required follow-up reports from his sleep disorders specialist deprives the Board of the authority to order issuance of an unrestricted medical certificate in this proceeding. We reject this argument.

It is our understanding of the medical evidence that sleep apnea is a dangerous condition because of its symptoms, which include fatigue and lack of alertness, due to lack of restful sleep. For an airline pilot, it is patently obvious that the condition, when left untreated, is disqualifying under FAR 67.13(f)(2), and in fact petitioner was disqualified when he suffered from symptoms including lack of alertness, fatigue, irritability, and apparently, cardiac arrhythmias.

Petitioner has been treated by the same board-certified sleep disorders specialist since 1988, Dr. Wellman. Once petitioner was able to establish to the Federal Air Surgeon's

satisfaction that his treatment was successful and his symptoms had resolved, petitioner's medical certificate was returned to him with the added requirement that he submit a report from Dr. Wellman every six months. That report, according to Dr. Wellman, was required not because of petitioner's medical condition, but because of petitioner's avocation -- the Administrator wanted to insure that petitioner was continuing to comply with his treatment.

The undisputed evidence is that petitioner is presently fully compliant with his treatment program, and that he no longer suffers any symptoms. Objective testing results obtained by Dr. Wellman show that petitioner uses the CPAP device consistently. He is fully alert and awake every day. Without symptoms, there is no medical basis for finding that petitioner is not now, or will be unable within the next two years, to perform his duties as an airman. Dr. Hudson's testimony that he is aware of at least 25 airline pilots who have <u>treated</u> sleep apnea and hold unrestricted certificates is consistent with our understanding that asymptomatic sleep apnea is not disqualifying. Moreover, the Administrator offered absolutely no medical evidence to the contrary. Indeed, his only witness to testify regarding this condition, Dr. Berry, did not appear to consider petitioner's sleep apnea condition to be a disqualifying condition.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied;

2. The initial decision and order are affirmed; and

3. A first-class airman medical certificate be issued to petitioner upon his application therefor, provided he is otherwise fully qualified.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order. HALL, Chairman submitted the following statement, in which HAMMERSCHMIDT joined:

> I concur in the majority's decision. The evidence that petitioner suffers from a disqualifying medical condition is simply not compelling. Too many of the professionals have been of too many minds to be convincing of anything more than that they are, like I am, deeply troubled by the possibility that another cockpit could be made unsafe by a repeat of the events that are displayed in this record. We have learned time and again of the importance of cockpit resource management. If petitioner is unable to work with his cockpit crew to insure the highest level of safety for the paying public, his employer ought to be able, somehow, to ground him unless or until he can. As the up and down evaluations in this case demonstrate, not every disruptive personality can be shown to be medically unfit, though surely management should be within proper bounds to insist that, no matter how senior or how technically competent, every line pilot must work as a member of a unit within the cockpit or risk removal from it. Management needs to be steadfast in its insistence on professionalism and take departures from cockpit resource management criteria as seriously as it would view technical or operational deficiencies.